(2)

Supreme Court, U.S.
FILED
SEP 9 1993
OFFICE OF THE CLERK

No. 92-1970

In the Supreme Court of the United States

OCTOBER TERM, 1993

DAVID REM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MICHAEL E. O'NEILL
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

14 pp

QUESTION PRESENTED

Whether the district court correctly found that petitioner, who disembarked from a train and left his unmarked suitcase in a public luggage rack on the train, abandoned that suitcase for Fourth Amendment purposes.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Abel v. *United States*, 362 U.S. 217 (1960)	7
California v. *Hodari D*, 111 S. Ct. 1547 (1991)	8
Hester v. *United States*, 265 U.S. 57 (1924)	7
Miller v. *Fenton*, 474 U.S. 104 (1985)	6
United States v. *Diggs*, 649 F.2d 731 (9th Cir.), cert. denied, 454 U.S. 970 (1981)	7-8
United States v. *Jones*, 707 F.2d 1169 (10th Cir.), cert. denied, 464 U.S. 859 (1983)	7, 9
United States v. *Kendall*, 655 F.2d 199 (9th Cir. 1981), cert. denied, 455 U.S. 941 (1982)	9
United States v. *Lewis*, 921 F.2d 1294 (D.C. Cir. 1990)	8
United States v. *Patrick*, 899 F.2d 169 (2d Cir. 1990)	6
United States v. *Piaget*, 915 F.2d 138 (5th Cir. 1990)	7
United States v. *Thomas*, 864 F.2d 843 (D.C. Cir. 1989)	7
United States v. *Williams*, 569 F.2d 823 (5th Cir. 1978)	6
United States v. *Winchester*, 916 F.2d 601 (11th Cir. 1990)	7

Constitution and statute:

U.S. Const. Amend. IV	6, 7, 8
21 U.S.C. 841(a)(1)	2

Miscellaneous: Page

1 Wayne R. LaFave, *Search and Seizure* (2d ed. 1987) ... 8

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1970

DAVID REM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 984 F.2d 806. Pet. App. 1a-16a.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1993. On April 22, 1993, Justice Stevens extended the time within which to file a certiorari petition to and including June 11, 1993. The petition for a writ of certiorari was filed on June 11, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the Central District of Illinois for possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Following an unsuccessful suppression motion, petitioner entered a conditional guilty plea to the indictment. He was sentenced to a term of 151 months' imprisonment, to be followed by three years' supervised release. The court of appeals affirmed.

1. On May 26, 1991, petitioner, traveling under the name "David Reilly," paid over $700 in cash for a one-way Amtrak ticket from Los Angeles to Chicago. That same day, petitioner boarded sleeper car number 0430 and occupied a deluxe private sleeper room. Petitioner carried a small backpack and a large Samsonite suitcase. 28 Tr. 18, 68. Petitioner kept his suitcase with him in his compartment and remained exclusively in the sleeper car, having meals brought to him. He refused to permit the attendant to enter his compartment to make his bed. Just outside Albuquerque, New Mexico, however, Amtrak personnel moved petitioner to a different compartment in the sleeper car because the private sleeper room had been previously reserved. 28 Tr. 16, 75.

On the morning of May 28, 1991, during a scheduled stop in Kansas City, Missouri, police officers arrested two people on car 0430 in an unrelated drug investigation. Amtrak personnel told the officers that they also suspected petitioner of carrying drugs. 28 Tr. 7, 9. Because the layover in Kansas City was brief, however, the officers could not investigate the matter further. The officers instead called the Chicago police and told them that they had arrested two individuals for drug possession who were traveling in the same sleeper car as petitioner, and that they suspected petitioner of carrying drugs as well.

Chicago police officers met the train when it arrived in that city. The officers spoke with several Amtrak employees, who reported that petitioner had "jumped off" the train in Chillicothe, Illinois, pushing by an elderly woman who was the only passenger scheduled to get off there, and running away from the train as an attendant attempted to stop him. He was carrying only his backpack. Pet. App. 2a-3a. One of the Amtrak attendants told the police that petitioner had left his suitcase in the passenger luggage rack, located in the public area near the door to car 0430. 28 Tr. 14-17, 29-30, 66, 82. Once all the passengers had vacated car 0430, the officers boarded the train, removed the suitcase from the luggage rack, and took it to the train platform where it was opened. 28 Tr. 17-21, 66. The suitcase, which bore no identification tags, was found to contain approximately 18 kilograms of cocaine, fabric softener strips, and a few articles of clothing. 28 Tr. 21-22. After completing the search, the officers took the suitcase to the Drug Enforcement Administration office at the train station.

Shortly thereafter, Amtrak employees reported to the police officers that they had just seen petitioner in the station. 28 Tr. 23. The officers walked into the train station's lobby area, where they saw petitioner talking on a pay telephone.[1] The officers approached petitioner and asked if they could speak with him. 28 Tr. 24. Petitioner nervously attempted to hang up the telephone. Petitioner agreed to talk to the officers, and when asked, produced a New York driver's license bearing the name "David Rem." Petitioner denied having been aboard the

---

[1] Later investigation revealed that after petitioner departed the train in Chillicothe, he took a cab to the Peoria, Illinois airport, boarded a flight to Midway Airport in Chicago, checked himself into a motel, and then took a cab to Union Station, arriving some 45 minutes after the train. 28 Tr. 28, 63-64.

train from Los Angeles, or having been aboard any train at all. He stated that he was "just looking around" the train station. 28 Tr. 27. Petitioner claimed that he had been staying in a Chicago hotel for about two weeks, but he could not remember the hotel's name or location. After Amtrak employees identified petitioner as the individual who had traveled on the train under the name of "David Reilly," the officers arrested him.

2. The district court denied petitioner's motion to suppress, finding that petitioner had abandoned the suitcase on the train. 28 Tr. 114-116. On petitioner's motion for reconsideration, the district court reopened the suppression hearing and permitted petitioner to testify. Petitioner testified that he was in car number 0431, not 0430; that he did not remain in his private compartment or ask the staff to bring him meals, and that he knew nothing of the arrests of the other two individuals. Although admitting that he was traveling to Chicago as a drug courier, petitioner testified that he never placed the suitcase in the luggage rack and that he left the train in Chillicothe to make a telephone call with the intention of reboarding and continuing on to Chicago. Petitioner claimed that he accidently missed the train, was stranded in Chillicothe, and sought to travel to Chicago as quickly as possible in order to retrieve the suitcase. In short, petitioner argued that he did not intentionally abandon the suitcase. After hearing petitioner's testimony, the court reaffirmed its earlier ruling denying suppression, explaining that it did "not believe that [petitioner's] testimony [was] particularly credible." 35 Tr. 44. The court emphasized that it found especially incredible petitioner's claims that he accidentally missed the train at Chillicothe, and that he had left the suitcase in his compartment (rather than in a public area). 35 Tr. 45-46. The court therefore again concluded "that at the time that [petitioner] left the train in Chillicothe, it was

his intent to abandon the luggage containing the 18 kilos of cocaine. He most certainly reconsidered that, or at least decided to keep as many of his options open as he could, by going to the train station as he did at a later point [in] time, but * * * that's [not] particularly relevant to this analysis." 35 Tr. 46. The district court alternatively found that even if no actual abandonment took place, the officer's good faith belief in the existence of facts establishing abandonment precluded suppression. 35 Tr. 46-47.

3. The court of appeals affirmed. Pet. App. 1a-16a. The court rejected petitioner's argument that it should focus on petitioner's "subjective desire to regain possession of the suitcase as proof of his expectation of privacy." *Id.* at 9a. Instead, the court found that "[w]e must * * * examine the objective facts as the * * * agents encountered them." *Ibid.* Recounting the information known to the officers at the time of the search, the court noted that petitioner had paid for his ticket with a large amount of cash just before departure, that he gave Amtrak a disconnected telephone number as a callback number, that he had seemed to the crew unusually concerned about the Kansas City arrests, that he had "jumped off" the train at an unannounced stop, and that he "left the train hurriedly, almost knocking over another passenger." *Id.* at 12a-13a. In light of those facts, the court concluded that it was reasonable for the officers to conclude that petitioner had abandoned the suitcase on the train.

With respect to petitioner's travel to Chicago in a purported effort to claim ownership of the suitcase, the court noted that the district court had found incredible petitioner's claim he had not intended to abandon the suitcase, and affirmed that finding as not clearly erroneous. Pet. App. 14a-15a. In the court's view, petitioner therefore "was just like the bank robber who having a

gun, finds himself pursued, and in his hope of escaping detection throws the gun into a yard—where, if it is not picked up he might retrieve it. Such conduct is transparently an abandonment of the tight grip of ownership and reliance solely on the feeble hope of reacquisition." *Id.* at 14a (quoting *United States* v. *Williams*, 569 F.2d 823, 826 (5th Cir. 1978)). Because petitioner's abandonment of the suitcase negated any privacy interest he may have had in it, the court held that the officers' warrantless search of the suitcase did not violate the Fourth Amendment.

ARGUMENT

1. Petitioner first contends that the courts of appeals apply differing standards of review in evaluating Fourth Amendment "abandonment" claims. Pet. 6-9, 14-17. As a general matter, we agree with petitioner (Pet. 6-7) that a district court's findings of historical fact are subject to a clearly erroneous standard of review, while the ultimate question whether the Fourth Amendment is implicated on those facts is a legal question subject to de novo review. See, *e.g.*, *United States* v. *Patrick*, 899 F.2d 169, 171 (2d Cir. 1990). Thus, the question whether petitioner "abandoned" the suitcase for Fourth Amendment purposes is a question of law, reviewable de novo by the court of appeals. By contrast, the factual findings on which such a decision is based—whether, for example, petitioner left the suitcase in a public luggage rack—are subject to review only for clear error. Cf. *Miller* v. *Fenton*, 474 U.S. 104, 112 (1985).

We disagree, however, with petitioner's claim (Pet. 8) that the court of appeals reviewed the legal and factual elements of the issue of abandonment only for clear error. The court invoked that standard only as to "the district court's factual findings regarding abandonment," Pet. App. 7a, in a passage that was immediately followed

by a discussion of the "law of abandonment," *id.* at 7a-8a, and the legal test generally applied to that question, *id.* at 8a. The court of appeals' opinion therefore is most naturally read as having reviewed the subsidiary, historical facts under the "clearly erroneous" rule, while correctly analyzing the ultimate issue of abandonment in purely legal terms. Because the court of appeals applied the correct standard of review in this case, petitioner's claim to the contrary does not warrant review.[2]

2. On the merits, the court of appeals correctly held that petitioner's conduct amounted to an abandonment of the suitcase. Petitioner's disagreement with that conclusion does not warrant further review.

The Fourth Amendment does not forbid a warrantless search of abandoned property, unless the abandonment is caused by improper police conduct. *Abel* v. *United States*, 362 U.S. 217, 241 (1960); *Hester* v. *United States*, 265 U.S. 57, 58 (1924); *United States* v. *Piaget*, 915 F.2d 138, 140 (5th Cir. 1990); *United States* v. *Thomas*, 864 F.2d 843, 845 (D.C. Cir. 1989); *United States* v. *Jones*, 707 F.2d 1169, 1172 (10th Cir.), cert. denied, 464 U.S. 859 (1983). In determining whether property has been abandoned, courts typically consider whether the defendant voluntarily discarded or relinquished his interest in the property so that he no longer retained a reasonable expectation of privacy in it. See, *e.g.*, *United States* v. *Winchester*, 916 F.2d 601, 603 (11th Cir. 1990); *Thomas*, 864 F.2d at 845; *Jones*, 707 F.2d at 1172; *United States* v. *Diggs*, 649 F.2d 731, 735 (9th Cir.), cert. denied, 454 U.S.

---

[2] While petitioner correctly notes that there are some differences in how courts of appeals phrase the applicable standard of review, it is far from clear that those differences in language reflect distinctions that actually affect outcomes. In any event, as we explain below, given the historical facts found by the district court, the result that court reached in this case is manifestly correct under any standard of review.

970 (1981); see also 1 Wayne R. LaFave, *Search and Seizure* § 2.6(b), at 465 & § 2.1(c), at 309 (2d ed. 1987). A finding that property has been abandoned is not precluded by the fact that the property was discarded in response to lawful police investigation. See *California* v. *Hodari D.*, 111 S. Ct. 1547, 1552 (1991).

The court of appeals correctly determined that petitioner retained no reasonable expectation of privacy in the suitcase at the time of the search. Petitioner's actions on the train attest to the fact that he abandoned the suitcase when he left the train. After learning that the police had arrested on narcotics charges two individuals who were riding in his train car, petitioner "jumped off" the train carrying only his small backpack, and he was observed running away from the train. 28 Tr. 15. In so doing, he left the suitcase, which bore no identifying marks or tags, in a public rack on the train. The officers, who were informed of these events by Amtrak personnel, had every reason to believe that petitioner had abandoned the suitcase. That conclusion was confirmed by petitioner himself, who denied owning the suitcase or even having been on the train when the police first questioned him. Accordingly, the search of the suitcase did not violate the Fourth Amendment.

Petitioner argues (Pet. 9) that he retained a subjective expectation of privacy in the suitcase evidenced by his travel to Chicago in order to retrieve it. As an initial matter, the district court rejected petitioner's testimony on that point as incredible and found as a fact that petitioner harbored no such subjective intent when he left the train at Chillicothe. 35 Tr. 46. In any event, as the court of appeals correctly observed, petitioner's subjective intent with respect to recovering the suitcase is irrelevant. Cf. *United States* v. *Lewis*, 921 F.2d 1294, 1302 (D.C. Cir. 1990) (finding it irrelevant that bus passenger might have regained bag after all bus passengers denied

ownership); *United States* v. *Jones*, 707 F.2d at 1172 (observing that defendant's "hope[] that the police would not find [satchel] and that he could later retrieve it" is not relevant); *United States* v. *Kendall*, 655 F.2d 199, 202 (9th Cir. 1981) (holding that once suitcase is abandoned, defendant's subjective intent to retrieve it is irrelevant), cert. denied, 455 U.S. 941 (1982). The court of appeals' unremarkable application of settled law in this area does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MICHAEL E. O'NEILL
Attorney

SEPTEMBER 1993